

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Nest Builders, LLC,
License No. 20524913

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter is before Administrative Law Judge Beverly Jones Heydinger (ALJ) on a Notice of and Order for Hearing, Order to Show Cause, Order for Prehearing Conference and Statement of Charges, dated January 28, 2008. Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Respondent Nest Builders, LLC, Lawrence D. Allar, appeared on its own behalf.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61 (2006)¹, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Steve Sviggum, ATTN: Nancy Leppink, Director of Legal Services, Minnesota, Department of Labor and Industry, 443 Lafayette Road, St. Paul, MN 55155, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

¹ All statutory references are to the 2006 Minnesota Statutes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this report becomes a final decision. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed.

STATEMENT OF THE ISSUES

1. Did Respondent perform in breach of contract, in violation of Minn. Stat. § 326.91, subd. 1(4)?
2. Did Respondent fail to respond to the Department's requests for information, in violation of Minn. Stat. § 45.027, subd. 1a?
3. Did Respondent violate the October 29, 2007, Order, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(2) and 236.91, subd. 1(5)?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On February 4, 2008, a copy of the Notice of and Order for Hearing, Order to Show Cause, Order for Prehearing Conference, and Statement of Charges, was sent via first class mail to Respondent at the address on file with the Department and an alternative address, as appears from the Affidavit of Service by First Class Mail.
2. A prehearing conference was held on March 20, 2008, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, MN. Respondent participated by phone.
3. During the prehearing, Respondent denied the claims against him and provided information to the Department which the Department agreed to review. The Department indicated it would be willing to engage in settlement discussions with Respondent.
4. The matter was scheduled for hearing on June 11, 2008.²
5. On June 3, 2008, Respondent sent a letter to Assistant Attorney General Tostengard, stating that it had been "almost 12 weeks since" the Department received his answer to the summons, but he had yet to hear "any response" from the Department. Respondent requested the Department to "respond."³

² Prehearing Order, Mar. 21, 2007.

³ Letter to M. Tostengard, June 3, 2008.

6. Also on June 3, 2008, Respondent sent a letter to the ALJ, stating that because he “had not heard from the Department” he did not have enough time to hire legal counsel or prepare for the hearing scheduled on June 11, 2008. He requested the hearing be dismissed.⁴

7. Assistant Attorney General Tostengard sent a letter to the ALJ on June 4, 2008, stating that the Department had provided everything to Respondent; that Respondent provided a response to the Statement of Charges; and that the Department had no settlement offer for Respondent. Nonetheless, the Department agreed to a short continuance to allow Respondent more time to prepare for the hearing.⁵

8. A telephone conference was held on June 5, 2008, and the ALJ granted Respondent’s request for a continuance. Dates for rescheduling the hearing were discussed. On June 6, 2008, the ALJ sent a letter to the parties stating that a continuance had been granted and that three days in September were being held for hearing. The ALJ directed Respondent to notify her by June 20, 2008, of the date on which he would be available for hearing. The ALJ noted that the Department had not offered settlement and ordered Respondent to prepare for hearing.⁶

9. On July 7, 2008, the ALJ sent a letter to Respondent via certified mail, stating:

By telephone on June 5, 2008, and by letter dated June 6, 2008, I granted your request for a continuance of the hearing in this matter, but directed you to confirm for me whether your hearing should be scheduled for September 9, 12 or 30, 2008, and to do so no later than the close of business on June 20, 2008.

As of this date, you have not confirmed your availability for hearing. Thus, I have scheduled the matter for **September 9, 2008, at 9:30 a.m.**, at the Office of Administrative Hearings.

However, you must confirm to me in writing by **July 19, 2008**, that you will attend the hearing on September 9th and submit the Notice of Appearance. If I do not receive your written confirmation by July 19th, I will assume that you do not wish to pursue your appeal and a default order will be issued based on the facts alleged in the Notice and Order for Hearing.⁷

10. Respondent received and signed for the July 7, 2008, letter on July 17, 2008.⁸

⁴ Letter to ALJ, June 3, 2008.

⁵ Letter to ALJ, June 4, 2008.

⁶ Letter to Parties, June 6, 2008.

⁷ Letter to Respondent, July 7, 2008 (emphasis in original).

⁸ Certified Mail Receipt, July 17, 2008.

11. The ALJ has received no communication from Respondent since June 5, 2008.

12. Because Respondent failed to confirm his attendance at the September 9, 2008, hearing by July 19, 2008, he is in default.

13. Pursuant to Minnesota Rules, part 1400.6000, the allegations contained in the Notice of and Order for Hearing, Order to Show Cause, Order for Prehearing Conference, and Statement of Charges are taken as true and incorporated by reference into these Findings of Fact.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against Respondent under Minn. Stat. §§ 326.91; 45.027, subd. 1; 45.024; and 14.50.

2. Respondent received due, proper and timely notice of the charges against him, and of the time and place of the prehearing conference. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

4. Under Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. On default, the allegations of and the issues set out in that Notice of and Order for Hearing or other pleading may be taken as true or deemed proved without further evidence.

5. By failing to properly complete the Conrad home, Respondent performed in breach of contract in violation of Minn. Stat. § 326.91, subd. 1(4).

6. By failing to respond to the Department's requests for information, Respondent violated Minn. Stat. § 45.027, subd. 1a.

7. By violating the October 29, 2007, Order, Respondent violated Minn. Stat. §§ 45.027, subd. 7(a)(2) and 326.91, subd. 1(5).

8. Disciplinary action against Respondent is in the public interest.

Based upon these Conclusions the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED: that the Commissioner of the Department of Labor and Industry take adverse action against Respondent's license, censure Respondent, or impose a civil penalty upon Respondent.

Dated: August 4, 2008

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Default (not recorded)